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Region 8

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FILED  
EPA REGION VIII  
HEARING CLERK

IN THE MATTER OF:

Xcel Energy, Inc.

Pawnee (Morgan County) and  
Comanche (Pueblo County) Stations,  
Colorado

Proceedings Pursuant to  
Section 113(a)(1) of the  
Clean Air Act, 42 U.S.C.  
§7413(a)(1)

Notice of Violation

Docket No. CAA-08-2002-06

**NOTICE OF VIOLATION**

This Notice of Violation ("NOV") is issued to Xcel Energy, Inc. ("Xcel") for violations of the Clean Air Act ("Act") at the coal-fired power plants identified below. Xcel has embarked on a program of modifications intended to extend the useful life, regain lost generating capacity, and/or increase capacity at these coal-fired power plants.

Commencing at various times since at least 1994 and continuing to today, Xcel has modified and operated the coal-fired power plants identified below without obtaining New Source Review ("NSR") Prevention of Significant Deterioration ("PSD") permits authorizing the construction and operation of physical modifications of its boiler units as required by the Act. In addition, for each physical modification at these power plants, Xcel has operated these modifications without installing pollution control equipment required by the Act. These violations of the Act and the State Implementation Plan ("SIP") of Colorado have resulted in the release of massive unpermitted and, therefore, illegal amounts of Sulfur Dioxides ("SO<sub>2</sub>"), Nitrogen Oxides ("NO<sub>x</sub>") and/or Particulate Matter ("PM") into the environment. Until these violations are corrected, Xcel will continue to release massive amounts of illegal emissions into the environment.

This NOV is issued pursuant to §113(a)(1) of the Act, as amended, 42 U.S.C. §§7401-7671q. §113(a) of the Act requires the Administrator of the United States Environmental Protection Agency ("EPA") to notify any person in violation of a state implementation plan or permit of the violations. The authority to issue this NOV has been delegated to the Regional Administrator for EPA Region 8 and further redelegated to the Assistant Regional Administrator for the Office of Enforcement, Compliance and Environmental Justice.



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## STATUTORY AND REGULATORY BACKGROUND

1. When the Clean Air Act was passed in 1970, Congress exempted existing facilities from many of its requirements. However, Congress also made it quite clear that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979), "the statutory scheme intends to 'grandfather' existing industries; but...this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices whenever the unit is proposed to be modified in such a way that its projected representative actual annual emissions may increase.
2. The NSR provisions of Parts C and D of Title I of the Act require preconstruction review and permitting for modifications of stationary sources. Pursuant to applicable regulations, if a major stationary source is planning upon making a major modification, then that source must obtain either a PSD permit or a nonattainment NSR permit, depending on whether the source is located in an attainment or a nonattainment area for the pollutant being increased above the significance level. To obtain the required permit, the source must agree to install the Best Available Control Technology ("BACT") for an attainment pollutant or achieve the Lowest Achievable Emission Rate ("LAER") in a nonattainment area. Sources may not operate unless they meet the emission limits that would have been imposed by the permitting process.
3. Pursuant to Part C of the Act, the Colorado SIP requires that no construction or operation of a major modification of a major stationary source occur in an area designated as attainment without first obtaining a permit under 40 CFR § 52.21, and prohibits the operation of a major stationary source after a major modification unless the source has applied BACT pursuant to 40 CFR §52.21(j) and the Colorado SIP at Code of Colorado Regulations 5 1001-5. The PSD portion of the Colorado SIP was originally approved by EPA on 9/2/86 at 51 Fed. Reg. 31125, and amendments were later approved by EPA as follows: on 2/13/87 (52 Fed. Reg. 4622), 6/15/87 (52 Fed. Reg. 22638), 5/8/89 (54 Fed. Reg. 9780), 5/28/91 (56 Fed. Reg. 12849), 7/17/02 (57 Fed. Reg. 26997), 11/10/94 (59 Fed. Reg. 51376), 10/17/94 (59 Fed. Reg. 42500), 2/20/97 (62 Fed. Reg. 2910), 5/16/97, 62 Fed. Reg. 13332; and 4/24/98, 63 Fed. Reg. 14357. The PSD provisions of the Colorado SIP are implemented by the Colorado Air Quality Control Commission ("CAQCC") in its Air Quality Control Regulation No. 3 ("AQCR").
4. The Colorado SIP for PSD provides that no emission unit or source subject to that rule shall be constructed without obtaining an air construction permit that meets the requirement of that rule.
5. The SIP provisions identified in paragraph 3 above are all federally enforceable pursuant to §§110 and 113 of the Act.

**FACTUAL BACKGROUND**

6. Xcel operates the Pawnee Station, a fossil-fuel-fired electric utility steam generating plant located in Morgan County, near Brush, Colorado. The plant consists of one boiler unit with a total generating capacity of 505 megawatts that began operations in 1981.
7. Xcel operates the Comanche Station, a fossil-fuel-fired electric utility steam generating plant located in Pueblo County near Pueblo, Colorado. The plant consists of two boiler units, Unit 1 with a total generating capacity of 325 megawatts that began operation in 1973 and Unit 2 with a total generating capacity of 335 megawatts that began operation in 1975.
8. The Pawnee Station is located in an area that has the following attainment/nonattainment classifications, found at 40 C.F.R. 81.306:
  - For NO<sub>2</sub>, the entire state has been classified as "better than national standards".
  - For SO<sub>2</sub>, the entire state has been classified as "better than national standards".
  - For carbon monoxide ("CO"), the area has been classified as unclassifiable/attainment.
  - For ozone, the area has been classified as unclassifiable/attainment.
  - For PM<sub>10</sub>, the area has been classified as unclassifiable.
9. The Comanche Station is located in an area that has the following attainment/nonattainment classifications, found at 40 C.F.R. 81.306:
  - For NO<sub>2</sub>, the entire state has been classified as "better than national standards".
  - For SO<sub>2</sub>, the entire state has been classified as "better than national standards".
  - For CO, the area has been classified as unclassifiable/attainment.
  - For ozone, the area has been classified as unclassifiable/attainment.
  - For PM<sub>10</sub>, the area has been classified as unclassifiable.
10. Each of the plants identified in paragraphs 6 and 7 above emits or has the potential to emit at least 100 tons per year of NO<sub>x</sub>, SO<sub>2</sub> and particulate matter and is a stationary source under the Act.



## VIOLATIONS

11. Xcel has made "major modifications" of the Pawnee and Comanche Stations as defined by both 40 CFR §52.21 and Colorado SIP Rules at CAQCC Regulation No. 3, Part A §I.B.36.
  - i) The major modifications at its Pawnee Station include but are not limited to the following physical or operational changes, alone or in combination: a reheater redesign and replacement in 1994, and a redesign and upgrade of the condenser tubes in 1997 to regain lost generation due to condenser tube failures.
  - ii) The major modifications at its Comanche Station include but are not limited to the following physical or operational changes, alone or in combination: a reheater redesign and replacement at Comanche Unit 2 which was completed in 1994, and a replacement and redesign of a reheater and arch wall at Comanche Unit 1 in 2000.
12. Each of the modifications resulted in a net significant increase in emissions for SO<sub>2</sub>, NO<sub>x</sub>, and/or PM as defined by 40 CFR §§52.21(b)(3) and (23) and Colorado SIP Rules at CAQCC Regulation No. 3, Part A, I.B.59 and Part A, I.B.37.
13. For each of the modifications identified in 11 above, Xcel did not obtain a PSD permit pursuant to 40 CFR §52.21 and Colorado SIP Rules at CAQCC Regulation No. 3, Part B. In addition, for modifications after 1992, no information was provided to the permitting agency on an annual basis for a period of five years following the date the unit resumed regular operation demonstrating that the modification did not result in an emissions increase in accordance with 40 CFR §52.21(b)(21)(v).
14. The modifications do not fall within the "routine maintenance, repair and replacement" exemption found at 40 CFR §52.21(b)(2)(iii)(a) and Colorado SIP Rules at CAQCC Regulation No. 3, Part A, I.B.36. Each of these modifications was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the modification was performed to regain lost capacity and/or availability, extend the life of the unit, and/or increase capacity and/or availability. That the "routine maintenance, repair and replacement" exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the Court of Appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).
15. None of the modifications fall within the "increase in hours of operation or in the production rate" exemption found at 40 CFR §52.21(b)(2)(iii)(f), or Colorado CAQCC Regulation No. 3, Part A, I.B.36. This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity.

16. None of the modifications fall within the "demand growth" exemption found at 40 CFR §52.21(b)(33)(ii) and Colorado SIP Rules at CAQCC Regulation No. 3, because for each modification a physical change was performed which resulted in an increase of representative actual annual emissions.
17. Therefore, Xcel violated and continues to violate Clean Air Act, Part C: Prevention of Significant Deterioration of Air Quality ("PSD"), 42 U.S.C. §§7470 to 7492, and the permitting requirements of Colorado Air Quality Control Commission Regulation No. 3, Part B, IV.D.3 and 40 C.F.R. §52.21, by constructing and operating modifications at the Pawnee Station and the Comanche Station without the necessary permits and by constructing and operating without the application of BACT required by the Colorado SIP.
18. Each of these violations exists from the date of start of construction of each modification until the time that Xcel obtains the appropriate NSR permit and operates the necessary pollution control equipment to satisfy the Colorado SIP.

### ENFORCEMENT

Section 113(a)(1) of the Act provides that at any time after the expiration of 30 days following the date of the issuance of this NOV, the Regional Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, and/or bring a civil action pursuant to §113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation on or before January 30, 1997, and no more than \$27,500 per day for each violation after January 30, 1997. §113(c) of the Act, 42 U.S.C. §7413(c), provides that criminal sanctions may also be imposed, to redress knowing violations of the Act. §306 of the Act, 42 U.S.C. 7606, allows that federal contracts may be barred with any facility found in violation of the Act.

### OPPORTUNITY FOR CONFERENCE

Respondent may, upon request, confer with EPA. The conference will enable Respondent to present evidence bearing on the findings of violations, on the nature of the violations, and on any efforts Respondent may have taken or proposes to take to achieve compliance. Respondent has the right to be represented by counsel. A request for a conference must be made within 10 calendar days of receipt of this NOV, and the request for a conference or other inquiries concerning the NOV should be made in writing to:


James Eppers  
Enforcement Attorney  
Office of Enforcement, Compliance  
& Environmental Justice  
U.S. EPA Region 8  
999 18<sup>th</sup> Street, Suite 300  
Denver, CO 80202  
303-312-6893

By offering the opportunity for a conference or participating in one, EPA does not waive or limit its right to any remedy available under the Act.

### EFFECTIVE DATE

This NOV shall be effective immediately upon issuance.

Date Issued: June 27<sup>th</sup>, 2002.

  
Carol Rushin  
Assistant Regional Administrator  
Office of Enforcement, Compliance  
& Environmental Justice  
U.S. EPA, Region 8









































































